

The Politics of Crisis in the Federal Courts

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The Civil Justice Reform Act of 1990¹ is not exciting legislation. It does not allocate resources to B-1 bombers, commit our troops to foreign soil, nor promise to educate our youth. As enacted, it requires only that most federal trial courts consider the appropriateness of certain case management techniques.² Yet it became the focus of an intense and acrimonious debate between federal judges — usually among the most politically reticent of government employees — and a powerful senator, Joseph Biden. The story of the passage of the Civil Justice Reform Act is more than an interesting tale of interbranch wrangling over powers and responsibilities. Rather, it is a paradigm of the function of crisis rhetoric in legislative court reform efforts.

The Civil Justice Reform Act was based on the recommendations contained in a report, *Justice for All*, that in turn used the existence of a crisis in the federal courts to justify its call for legislation.³ Crisis rhetoric is enduringly popular in discussions of the court system.⁴ In addition to the task force report, the *Report of the Federal Courts Study Committee*, issued last year, relies to some extent on the existence of a crisis in the federal courts to support its calls for court reform.⁵ While both use claims of court crisis to argue for legislation, the reports do not agree about the nature of that crisis, nor do they account for, or even

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1. Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650 (1990) (codified in scattered sections of 28 U.S.C.).

2. For fuller description of the legislation, see *infra* part I.B.

3. THE BROOKINGS INSTITUTION, *JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION* (1989) [hereinafter *REPORT*].

4. Marc Galanter has been a dogged chronicler of the crisis rhetoric in some of its incarnations. See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) (the "crisis" of overlitigation); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) (the "crisis" of overlitigation).

5. THE REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) [hereinafter *FCSC*]. The FCSC report also spawned legislation in the Federal Courts Study Committee Implementation Act, Title III of The Judicial Improvements Act of 1990, Pub. L. No. 101-650 (1990) (codified in scattered sections of titles 5, 11, 9, 18 and 28 U.S.C.). The FCSC report has not yet had the legislative success of the task force report; Title III enacts only the "noncontroversial recommendations of the Federal Courts Study Committee." 136 CONG. REC. H8262 (daily ed. Sept. 27, 1990) (remarks of Rep. Kastenmeier); 136 CONG. REC. S17578 (daily ed. Oct. 27, 1990) (remarks of Sen. Grassley).

acknowledge, available evidence demonstrating that the federal courts' performance is strong and remains stable over time.⁶

I argue below that claims about the existence of a court crisis which threatens access to the federal courts provide their proponents with a public-interest justification for court reform. The public reliance on the court system is particularly strong, and policy disputes about the courts, when they take the form, for instance, of debates about jurisdiction, are surrounded by powerful ideological forces.⁷ Claims that the federal court system faces a crisis that requires participants in such debates to pull with a common oar become tempting as a way of circumventing predictable political controversy. Such claims should, therefore, be closely scrutinized to determine whether they disguise a more familiar, and controversial, political agenda.

Does either study make the case for the existence of crisis? Interestingly, neither really makes the attempt. Both reports use crisis rhetoric, instead, to justify a more controversial vision of the way the procedural or judicial resources of the federal courts should be allocated. *Justice for All* recommends a series of procedural requirements that, at bottom, is premised on a fundamental disagreement with policies inherent in the Federal Rules of Civil Procedure. *The Report of the Federal Courts Study Committee*, on the other hand, presents a brief for the artificial limitation of federal court capacity to provide adjudication.

In this essay, I critically discuss the reports' use of court crisis rhetoric and the evidence they marshal in support of crisis claims. With respect to both reports, I ask, "Whose crisis is being narrated, and to what effect?"

6. See TERENCE DUNGWORTH & NICHOLAS M. PACE, *STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS* (1990); WOLF HEYDEBRAND & CARROLL SERON, *RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF THE FEDERAL DISTRICT COURTS* (1990).

7. See, e.g., Richard H. Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988); Michael Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 WM. & MARY L. REV. 499 (1989).

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I. JUSTICE FOR ALL

A. *The Crisis Part I: Delay and Cost*

The Civil Justice Reform Act, as initially introduced, tracked completely the recommendations of a report entitled *Justice for All*.⁸ The report is the product of a task force convened at the Brookings Institution at the behest of Senator Joseph Biden, Chair of the Senate Judiciary Committee, to address delay and cost in the federal trial courts.⁹ Described by Senator Biden as a meeting of "people of historically divergent and powerfully stated views,"¹⁰ the task force was in fact dominated by past or present corporate counsel, which constituted a quarter of its membership.¹¹ None of the task force members were on the federal bench, although former federal judges participated.

The task force report rests on two firm assumptions. First, the federal trial courts are in a crisis that has as its primary symptoms unacceptable delays in processing civil cases, and unacceptably high costs in civil litigation generally.¹² Second, these problems are attributable to a lack of will on the part of the systems' players — the judges and lawyers who presumably control the pace of litigation. The first of these assumptions is explicit, the second implicit in the form of the report's recommendations, which are concerned primarily either with mandating new behavior, or with adjusting incentives to modify the behavior of lawyers and judges.¹³

While neither assumption is startling, both are controversial.¹⁴ The extent of, indeed the existence of, a crisis in civil litigation in the federal

8. REPORT, *supra* note 3.

9. *Id.* at vii. See also Robert Banks, *The Need for Reform*, 74 JUDICATURE 113 (1990) (discussing Senator Biden's role); Marcia Coyle, *Senate Sets Its Sights on Delay in Civil Trials*, NAT'L. L. J., July 23, 1990, at 5 (noting that Senator Biden was honorary chair of the Foundation for Change, the organization that conducted the opinion poll which underlies the task force report).

10. *The Civil Justice Reform Act of 1990 and The Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 Before the Committee on the Judiciary, S. Hr'g 1097*, 101st Cong., 2d Sess. 54 (1990) [hereinafter *Hearings*].

11. The effect of such a strong corporate presence will be discussed, *infra*. The task force also included representatives from consumer, environmental and civil rights groups and law professors. REPORT, *supra* note 3, at vii.

12. *Id.* at 1 (civil litigation "costs too much and takes too long").

13. While some of the report's recommendations are aimed at litigants, see *id.* at 36-37, these constitute such a tiny fraction of the recommendations that they clearly seem to be an afterthought.

14. I have previously addressed judges' own complaints about caseload pressures. See Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3 (1990).

trial courts is itself a hotly debated proposition.¹⁵ Thus, a crisis premised on excessive delay and cost cannot simply be asserted; rather, it must be demonstrated.¹⁶

For example, consider the reports' claims of excessive delays in federal trial courts.¹⁷ The median time from filing to disposition for most federal civil cases is eight months, not a particularly alarming figure.¹⁸ The longest median time for any single category of cases in 1989 was 15 months (for antitrust suits).¹⁹ If median times seem a less than acceptable measure of dispute resolution time, then consider that in 1986, 61% of all federal cases reached disposition within one year of filing.²⁰ Are the federal trial courts deteriorating over time? Hardly: the comparable one-year disposition time in 1971 was 60%.²¹

This information about the state of the federal trial courts is contained in the most thorough empirical study of federal civil cases ever conducted. The study, issued by the Rand Institute for Civil Justice, found that disposition times for federal civil cases remained "remarkably stable during the 1970's and 1980's despite a substantial increase in caseload during that period."²² In addition, "the termination rate has remained proportionate to the filing rate, indicating that the district courts have kept pace with the filing increases that have occurred."²³ Thus, while it may be possible to show, as the task force report asserts, that "in

15. Although not debated by Aetna Life and Casualty Foundation, one of the financial supporters of the report, see REPORT, *supra* note 3, at viii. Aetna has for years been telling us that "America's civil liability system has gone berserk. . . . [I]t is no longer fair. It's no longer efficient. And it's no longer predictable." Aetna advertisement, WALL ST. J., April 8, 1989, at 9, quoted in Marc Galanter, *The Day After The Litigation Explosion*, 46 MD. L. REV. 3, 4 (1986). Indeed, it is only the effect in some federal trial districts of the criminal docket, which the task force ignores, that makes the appellation "crisis" plausible for federal trial courts. See *infra* notes 66-68.

16. See, e.g., Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 123 (1983) (questioning whether litigations' costs are excessive); DUNGWORTH & PACE, *supra* note 6 (evaluation of civil docket over time reveals stability in processing time).

17. REPORT, *supra* note 3, at 1-7.

18. L. RALPH MECHAM, THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 10 (1989). This median excludes land condemnation cases, prisoner petitions, and deportation reviews. *Id.*

19. *Id.*

20. DUNGWORTH & PACE, *supra* note 6, at viii.

21. *Id.* The percentages are similarly stable for other across-time distributions: in 1971, "22% [were terminated] within 2 years, 10% within 3 years, and 8% later than that. In 1986, comparable percentages were 23%, 9% and 7%, respectively." *Id.*

22. *Id.* at vii.

23. *Id.* at vii-viii. While this study covered the period from 1970-86, the "trends identified hold true in more recent years." *Rand Studies Civil Workload of Courts*, THIRD BRANCH, Aug. 1990, at 5. See also HEYDEBRAND & SERON, *supra* note 6, at 130-31 (1990) (reporting that civil case terminations per judge reached an all-time high in 1988 and that judges have kept pace with backlog of pending cases and new filings).

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many courts litigants must wait for years to resolve their disputes,"²⁴ it would be hard to demonstrate that this was the ordinary state of affairs. Moreover, even the existence of some "slow" courts hardly justifies the task force's call for national legislation.

Further, the report implicitly asserts that we know "delay" when we see it. This leads to confidence that appropriate deadlines can be set for whole categories of cases, despite a lack of data about how long a case "should" take from filing to termination. Without such data, it is difficult to differentiate between "delay" and appropriate case development.²⁵ Thus, the report does not discuss the possibility that decreasing processing time would lead to less considered, or even incorrect, decisions, or foreclosure of claims on grounds other than their merit.

The report is no more forthcoming about its determination that litigation costs are excessive. It does not distinguish between costs to the courts, the public, or the litigants. However, we may assume that it is costs to litigants with which the report is especially concerned, for it identifies discovery abuse as the primary culprit of excessive costs.²⁶ While claims of widespread "abuse" of discovery tools are initially more intuitively appealing than claims of widespread delays, the discovery abuse issue is again problematic. Discovery is the subject of a thousand anecdotes, but there are empirical studies demonstrating that discovery is not a serious problem in most cases in federal court.²⁷ Rather than presenting even a minimal demonstration that the existence of rampant discovery abuse is a widespread problem demanding a nationwide solution, the report takes its existence as given.

The lack of support for the task force's call for new discovery controls is especially surprising when one considers that discovery abuse was the subject of a nationwide initiative as recently as 1983, when the

24. REPORT, *supra* note 3, at 1. No support is provided for this statement, however. Some courts are slow. DUNGWORTH & PACE, *supra* note 6, at 39-42. But the Rand study, *supra* note 23, demonstrates that these are the exception, not the rule.

25. See Mary Lee Lusk, *Building a Theory of Case Processing Time*, 62 JUDICATURE 114, 116 (1978).

26. E.g., REPORT, *supra* note 3, at 1 (cases "overdiscovered," attorneys "pursue ever more expensive means of discovery"); *id.* at 6 ("most important cause of high litigation costs or delays is abuse by attorneys of the discovery process, which leads to 'overdiscovery' of cases rather than to attempts to focus on controlling issues"); *id.* at 19 (discovery process is "out of control").

27. See, e.g., Abraham D. Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 696-98 (1983) (quoting Federal Judicial Center Study that concluded that "no discovery requests were filed in 50% of all cases [filed in federal court], and only 5% of all cases contained 10 or more discovery initiatives"); Jack B. Weinstein, *What Discovery Abuse?*, 69 B.U. L. REV. 649 (1989).

federal civil rules were amended with exactly this issue in mind.²⁸ A claim that yet another nationwide initiative in this area is needed requires more substantial justification than the report provides.²⁹

The authors of the report recognize that court cost and delay have been the object of any number of studies in recent years,³⁰ and so they make no claim that the recommendations they advance are new; rather, the report's claim to value comes from the consensus arrived at by the participants in the task force's discussions.³¹ Because, the authors argue, the task force is comprised of people with ideologically diverse views and because the report makes only those policy recommendations for which there was broad agreement, it represents a workable, politically palatable, noncontroversial solution to the problems presented by the civil docket in federal trial courts.³²

The report is a slim 39 pages. The emphasis on agreement and broad support, while clearly viewed as politically imperative for the legislative effort this report presaged, makes the report itself unsatisfying: there is too much consensus here and not enough evidence. Little attention is paid to the empirical basis for the report's recommendations. In keeping with its general tenor as a consensus document, the report has as its primary empirical source an opinion poll that asked 1000 judges,

28. See, e.g., FED. R. CIV. P. 16(b) (mandating scheduling orders that limit the time for completing discovery or filing and hearing motions and requiring a showing of good cause for modification of these scheduling orders); FED. R. CIV. P. 26(g) (sanctioning attorneys who certify discovery requests that are "unreasonable or unduly burdensome" or "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."). See generally, A. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* (1984).

29. The report notes that amendments to the Federal Rules of Civil Procedure in both 1980 and 1983 were intended to control discovery. The report simply states, "[u]nfortunately, these well-intentioned amendments have not adequately regulated the discovery process." REPORT, *supra* note 3, at 19.

30. Roscoe Pound identified delay and cost as among the causes of "popular dissatisfaction" with the law in 1906. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 408 (1906) (decrying "[u]ncertainty, delay and expense, and above all the injustice of deciding cases on points of practice.") See also THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin and Russell R. Wheeler eds., 1979). Serious empirical studies of delay in civil cases date at least from HANS ZEISEL ET AL., *DELAY IN THE COURT* (1959). In recent years, reports and studies include BARRY MAHONEY ET AL., *CHANGING TIMES IN TRIAL COURTS: CASEFLOW MANAGEMENT AND DELAY REDUCTION IN URBAN TRIAL COURTS* (1988); AMERICAN BAR ASSOCIATION, *ATTACKING LITIGATION COSTS AND DELAY* (1984); THOMAS CHURCH ET AL., *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* (1978).

31. REPORT, *supra* note 3, at 2.

32. *Id.* at 2-3.

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litigators, and corporate counsel their opinions about cost and delay.³³ Unsurprisingly, no one favors them.³⁴

The poll results, however, might have led to some rethinking about the definition of the problem. In answer to a preliminary question about the respondents' view of how "the process of civil litigation works in the federal courts," the overwhelming majority in every category responded "very well" or "somewhat well."³⁵ Similarly, when asked to volunteer their "most serious criticism . . . of the process of civil litigation in the Federal Courts today," relatively small percentages of respondents cited "costs/cost of litigation."³⁶ While "delays/too slow in reaching court" was the most frequent response, it too accounted for relatively small percentages of answers.³⁷

More fundamentally, however, the relationship between reducing delay and cost, and increasing access to justice, the purported goal of the task force,³⁸ is problematic. As George Priest has convincingly demonstrated, the effects of reform efforts keyed toward reducing delay are limited by what he phrases the "congestion equilibrium."³⁹ Reducing delay does not have the effect of simply making the existing cases in the civil system move more quickly; rather, delay-reduction reforms have more subtle systemic consequences. Several commentators have argued that the probable effect of reducing delay and cost in civil litigation is to encourage more filings. Priest has argued⁴⁰ that reforms that speed things up produce a "shift from settlement to trial," not an ultimate reduction in

33. See LOUIS HARRIS & ASSOCIATES, *PROCEDURAL REFORM OF THE CIVIL JUSTICE SYSTEM* (1989) reprinted in *Hearings, supra* note 10, at 94-184.

34. *Id.* The poll "focused on perceptions and attitudes about whether increasing litigation transaction costs and delays in the federal civil justice system are a problem, and, if so, to assess the magnitude of the problem, its probable causes, and a broad range of possible solutions." *Id.* at i.

35. The totals were: 91% of the private defense respondents, 96% of the plaintiffs' litigators, 86% of the public interest litigators, 80% of the corporate counsel, and 95% of the federal judges. As was consistently true of the survey responses, corporate counsel are the most dissatisfied with the workings of the system. *Id.* at 6.

36. The highest percentage, 15% was federal judges. The other results were: private defense, 11%; plaintiffs' litigators, 12%; public interest litigators, 12%; corporate counsel, 12%. *Id.* at 11.

37. Public interest litigators cited delay most frequently (35%); federal judges were the least concerned (14%). *Id.*

38. REPORT, *supra* note 3, at 6 ("High transaction costs - manifested in high out-of-pocket legal fees and the time consumed by delay - are the enemies of justice.").

39. George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 558 (1989); Geoffrey P. Miller, *Some Thoughts on the Equilibrium Hypothesis*, 69 B.U. L. REV. 561 (1989) (expanding Priest's model).

40. Priest supported his model with empirical evidence from the delay reduction programs implemented in Cook County, Illinois. Priest, *supra* note 39, at 544-56.

delay.⁴¹ While no one favors delay, "where it is acknowledged that delay is inevitable . . . consensus disappears."⁴²

Even if one accepts that the current state of affairs is not optimal, one gets little sense from the report that it might have more complex causes than lack of discipline on the part of attorneys, clients, and judges. The report repeatedly attributes cost and delay to a failure of will on the part of attorneys and judges.⁴³ There is empirical support for the belief that the "local legal culture" — the expectations of the actors in the system — is a strong influence on the pace of litigation.⁴⁴ But this knowledge does not translate quite as easily into the policy recommendations suggested by the report as one might imagine. The hypothesis of the effect of a "local legal culture" on litigation pace is associated with the work of the National Center for State Courts, which has studied the phenomenon of court delay extensively. Most recently, in an ambitious study, the Center has concluded that many reform measures fail because they affect only superficially the underlying determinants of the "local legal culture."⁴⁵ This observation, however, tells us nothing about "the characteristics of low-delay cultures" nor does it suggest "how such cultural norms can be transported from one jurisdiction to another."⁴⁶ The report's recommendations must rest, then, on the belief that mandating new behavior will pull the system into line, notwithstanding

41. *Id.* at 558.

42. *Id.*

43. REPORT, *supra* note 3. For example, mandatory time limits are necessary to "alter the inertia of the system and give parties and judges strong incentives to move cases along quickly to disposition." *Id.* at 11. And information about how long cases have been pending on judges' dockets should be made public. *Id.* at 27 ("substantially expanding the availability of public information about caseloads by judge [sic] will encourage judges with significant backlogs in undecided motions and cases to resolve those matters and to move their cases along more quickly.").

44. See, e.g., Thomas W. Church, Jr., *Civil Case Delay in State Trial Courts*, 4 JUST. SYS. J. 166, 181-82 (1978) (speed of disposition of civil cases is "result of a stable set of expectations, practices and informal rules of behavior which . . . [Church calls] 'local legal culture'"). See also NATIONAL CENTER FOR STATE COURTS, MANAGING TO REDUCE DELAY 13 (1980); MAHONEY, *supra* note 30, at 87-89.

45. MAHONEY, *supra* note 30. Further, the study found no correlation between adoption of settlement methods (such as alternative dispute resolution), calendaring methods, or automated dockets, and speed of disposition. *Id.* at 84-89, 192-97. The study found that some jurisdictions which practiced aggressive case management had low delay levels. But as Priest has noted, "the clearly unsystematic character of the relationship suggests a troublesome issue of causation: Does strict case management actually reduce delay or is strict case management only feasible in jurisdictions without overwhelming backlogs?" Priest, *supra* note 39, at 530.

46. Priest, *supra* note 39, at 530. See also DUNGWORTH & PACE, *supra* note 6, at x-xi (detailed study of federal courts unable to answer question "why are the slow . . . districts slow and the fast districts fast?").

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any of a number of external restraints, such as the underlying economics of law practice,⁴⁷ or the vicissitudes of the criminal docket.

Accepting the report's initial premises, how does the task force recommend that these problems be addressed? While its recommendations are divided into three categories, the report's focus is on changes in procedures.⁴⁸

The central recommendation is that every federal trial court be statutorily required to develop a "Civil Justice Reform Plan."⁴⁹ The remainder of the procedural recommendations center on the plans' contents. First, the report favors assigning cases to tracking systems based on an initial early assessment of the case's complexity,⁵⁰ and following that assignment with different procedures for different tracks. Second, given the behavioristic assumptions of the report, the core recommendations for plan content involve the imposition of deadlines for attorneys and judges. The mandatory content of the plans, then, includes deadlines for trial,⁵¹ for completion of discovery,⁵² and for decisions on motions.⁵³ These deadlines would vary according to how a case was "tracked," and would be subject to only a narrow, "good cause" exception.⁵⁴ Finally, the report relies heavily on case management through active judicial involvement in the pretrial phase,⁵⁵ and favors displacing magistrates from their current involvement in pretrial case management.⁵⁶ In keeping with its emphasis on disposing of cases at the

47. See Earl Johnson, Jr., *Lawyer's Choices: A Theoretical Appraisal of Litigation Investment Decisions*, 15 LAW & SOC'Y REV. 567 (1980) (evaluating litigation decisions through economic analysis of fee payment method); HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* 117-21 (1990) (empirical analysis of effects of fee arrangements on lawyer effort).

48. The report also makes recommendations for expanding judicial resources, and recommendations for clients and their attorneys. REPORT, *supra* note 3.

49. *Id.* at 12. The plan would be developed with the assistance of an advisory group made up of representatives of the bar and the public. *Id.* While the report states that it advocates a "bottom up" approach, with Congress mandating only the core of the plans and individual courts filling in the details, *id.* at 11, the recommendations are sufficiently detailed to act as a significant restraint on local autonomy.

50. *Id.* at 11, *see also* pp. 14-17.

51. *Id.* at 17.

52. *Id.* at 19.

53. *Id.* at 22 (recommending standard times for decisions on motions); *see also* pp. 11, 16-22.

54. *Id.* at 21-22.

55. *Id.* at 23-25.

56. *Id.* at 28. This recommendation is extremely puzzling, and seems almost offhand. The report recognizes the alarms raised by commentators about extensive pretrial involvement by judges who might later be required to try the case on the merits. *E.g.*, Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). Using magistrates to supervise pretrial could avoid some of the issues raised by judicial involvement in the pretrial period. Recent work has indicated that one variable that actually correlates positively with reduced delay on both the civil and criminal side is the contribution of

earliest possible moment, the report also recommends institution of "early neutral evaluation" procedures.⁵⁷

The report contains recommendations for expanding judicial resources by increasing administrative support, filling judicial vacancies, and increasing judges' salaries. In keeping with its emphasis on strong judicial management of cases, it also suggests expanded judicial case management training programs.⁵⁸ In addition, it contains an abbreviated section entitled "Recommendations for Clients and Their Attorneys," which exhorts lawyers to restrain themselves and urges clients to control their attorneys' excesses.⁵⁹ However, the heart of the report is clearly the procedural reform section, and it is that section which deserves close scrutiny.

In the report's view, most problems in the trial courts could be solved by deadlines. But a small example demonstrates that the task force's disinterest in the context in which civil litigation occurs renders such optimism questionable. Perhaps the strongest of the deadline recommendations is that the trial court be required to set "early, firm trial dates."⁶⁰ The report correctly notes wide agreement among commentators, judges and lawyers that setting firm trial dates would speed case processing.⁶¹ For instance, an impressive 89% of the federal judges surveyed in the Harris poll strongly supported setting firm trial dates.⁶²

Given this consensus, one would suppose that the task force might become curious about why the practice of setting firm trial dates had not caught on, and it is here that the task force's emphasis on corporate participants and the lack of federal judges clearly shows. The most obvious answer has to do with the criminal docket, the effect of which on civil litigation the report ignores entirely. The combined effects of the Speedy Trial Act,⁶³ which controls trial dates on the criminal side, the federal sentencing guidelines,⁶⁴ which many judges believe have led to decreased incentives for plea bargaining and thus resulted in more

magistrates. HEYDEBRAND & SERON, *supra* note 6, at 157.

57. REPORT, *supra* note 3, at 23-25.

58. *Id.* at 30-33.

59. *Id.* at 34-38.

60. *Id.* at 17.

61. See, e.g., NATIONAL CENTER FOR STATE COURTS, *supra* note 44, at 12-13. The report does not mention, however, that many commentators believe that setting firm trial dates is the only managerial device that has been demonstrated to have an effect on case processing time.

62. REPORT, *supra* note 3, at 19.

63. 18 U.S.C. §§ 3161-3174 (1976).

64. See Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3586, and 28 U.S.C. §§ 991-998 (1982).

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criminal trials,⁶⁵ and the so-called "war on drugs," which has led to increased criminal filings,⁶⁶ have been devastating for the civil dockets of some trial courts.⁶⁷ Even where the effects are not devastating, they certainly must be taken into account in any rational scheme that requires firm civil trial dates as part of a mandatory management program.⁶⁸ The report, however, contains only one sentence about the criminal docket, and that simply notes that the "processing of civil cases . . . is slowed by rising numbers of criminal cases, which in effect must be given priority in scheduling."⁶⁹

Discovery deadlines are another area where some examination and analysis of current practice in the federal courts might have been informative. The report recommends that time guidelines for the completion of discovery be tailored to each track.⁷⁰ Following the 1983 amendments to the Federal Rules of Civil Procedure, however, most federal courts adopted limits on discovery practice through their local rules.⁷¹ Several have, in fact, adopted explicit time frames for the completion of discovery, notwithstanding the use of scheduling orders,⁷²

65. See, e.g., Diane E. Murphy, S. 2648, *The Judicial Improvements Act of 1990: The Concerns of Federal Judges*, 74 JUDICATURE 112, 114 n.2 (1990) (noting that more criminal defendants are going to trial because of the sentencing guidelines, which also require lengthy collateral proceedings).

66. While federal civil caseloads decreased by 7% in 1990, criminal case filings grew by 6%. That percentage increase is twice what it was in 1989. *Court's Caseload Continues to Increase*, THIRD BRANCH, Sept. 1990 at 1-3 (reporting on Report of Administrative Director of the United States Courts). See Michael Tackett, *Drug War Chokes Federal Courts; Assembly Line Justice Imperils Legal System*, CHI. TRIB., Oct. 14, 1990 (chronicling effects of both drug caseload and sentencing guidelines on federal courts); W. John Moore, *Courting Disaster*, 22 NAT'L J. 509 (1990) (rapidly rising number of drug cases, impact of sentencing rules and Speedy Trial Act threatening to bury federal court system).

67. See, for example, *Middle District of Florida Suspends Civil Trials*, THIRD BRANCH, Feb. 1991, at 9. See also Ann Pelham, *Biden Plan Puts the Spurs to Federal Judges*, TEX. LAW., Mar. 12, 1990, at 9 (quoting Chief Judge Lucius Bunton, Western District of Texas "If I don't get more judges in the next two to three years [to help with drug cases], we'll just have to say adios to civil cases.").

68. One federal trial judge commented that the initial legislation premised on the report, which ignores the effects of the criminal docket, "indicates . . . a lack of understanding of what life is like in the federal courts today." Pelham, *supra* note 67.

69. REPORT, *supra* note 3, at 9-10.

70. *Id.* at 19. The report suggests that an "expedited" track might have a guideline of 50-100 days, a "standard" track allow 100-200 days, and a "complex" track allow 6-18 months. *Id.*

71. For instance, courts in 51 districts place numerical limits on the certain kinds of discovery, such as interrogatories. (List of rules on file with author.) In addition, most courts use the provisions of FED. R. CIV. P. 16(b) to establish discovery completion dates. *Id.*

72. E.g., Kansas (4 months); Mississippi (6 months). *Id.*

or have some form of tracking already in place.⁷³ The time frames vary widely from court to court, making it possible to study what effect these deadlines and time frames have.⁷⁴

To the extent discovery constraints limit the resources available for claim development, they may have clear substantive effects, as the participants in the task force are aware.⁷⁵ Time limits, especially if coupled with the limits on allowable discovery devices already in place in many federal trial courts, implicitly require lawyers to reject some avenues of claim development in response to scarcity of procedural moves.⁷⁶ Such effects are especially likely under the regime the report contemplates, because it advocates a particularly narrow form of "staged" discovery, in which initial discovery is limited to "inspecting a few documents and taking a few depositions" in order to provide just that quantum of discovery necessary to make a "realistic assessment" of the case.⁷⁷

Discovery limitations, in fact, seem to be the engine powering many of the recommendations. In discussing the case tracking requirements, for instance, the report states (without further comment) that "[f]or many cases the large-scale discovery methods available under the rules are simply unnecessary."⁷⁸ (The report does not suggest which of the discovery methods are "unnecessary" or how the tracking plans will make this determination, or even that attorneys now choose these "large-scale" discovery methods in small-scale disputes.)

Similarly, the purpose of tracking is to set early trial dates and "impos[e] time limits on the discovery process, directed toward completion of discovery, with related limits on the resolution of motions."⁷⁹ Setting firm trial dates, in turn, requires attorneys to make choices about investigation through discovery. While the report quotes approvingly from an article by Professor Donald Elliott about the practice

73. For instance, some courts require discovery to be completed in cases exempt from scheduling orders under FED. R. CIV. P. 16 within certain timeframes. See, e.g., Northern District of Georgia (4 months after answer filed); Western District of North Carolina (90 days). *Id.*

74. The Federal Judicial Center has done some study in this area. See, e.g., CAROLL SERON, FEDERAL JUDICIAL CENTER, THE USE OF STANDARD PRETRIAL PROCEDURES: AN ASSESSMENT OF LOCAL RULE 235 OF THE NORTHERN DISTRICT OF GEORGIA (1986).

75. The report cites, and even quotes, several articles that make the point about the connection between discovery limits and issue foreclosure. REPORT, *supra* note 3, at 18 (quoting E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 313 (1986)); *id.* at 24 (citing Resnik, *supra* note 56).

76. See Robel, *supra* note 14, at 14-15.

77. REPORT, *supra* note 3, at 20.

78. *Id.* at 14.

79. *Id.* at 15.

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of setting such dates,⁸⁰ it fails to read the sentences following its quotation:

When a managerially-minded judge limits discovery to certain issues or selects a trial date only a few months away, the judge forecloses the development of issues. Sometimes the actions of the managerial judge determine directly which issues are foreclosed; more often, the judge's action forces counsel to make that decision. But in either case, issues are foreclosed.⁸¹

In the vast majority of cases, where little or no discovery occurs, such discovery limits are not likely to have much effect one way or the other (although other time limits, if severe enough, may still lead to claim foreclosure through restricting the time available to construct the case).⁸² Regardless, from the point of view of corporate defendants, as is clear from the hearings on the legislation, discovery limitations are a second-best alternative to the abolition of discovery altogether.⁸³ The obsession with shortening the periods in which attorneys and judges do their work (even shortening the time for service of process!)⁸⁴ and embarrassing judges who take their time⁸⁵ is not a simple desire to see the trains run on time. Rather, it is a calculated strategy to foreclose claims at earlier and earlier stages of the proceedings.

I have been taking the report's claims to desire reductions in cost and delay at face value, however. Given the stature of the task-force participants, the report's failings as a piece of serious scholarship about the courts suggest that this was a document meant primarily for political

80. *Id.* at 18.

81. Elliott, *supra* note 75, at 315. Elliott's article is a thoughtful discussion of many of the criticisms of this sort of claim preclusion.

82. See Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 637 (1989) (arguing that the threat of discovery changes the terms of settlements in ways unrelated to the parties' legal entitlements, and that the terms of settlement are affected most when parties threaten discovery, but never use it).

83. See, e.g., *Hearings*, *supra* note 10, at 384 (testimony of Carl D. Liggio on behalf of the Corporate Counsel Association) ("[T]he Bill does not cure the root problem, but only affords some possible relief. . . . The root problem is the fact that with the advent of the Federal Rules of Civil Procedure, we adopted a policy of wide open discovery."); *id.* at 14 (statement of Patrick Head, Vice President and General Counsel of FMC Corporation) ("I see little in the Federal Rules [of Civil Procedure] that on balance helps defendants," quoting Geoffrey Hazard, *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2242 (1989)).

84. REPORT, *supra* note 3, at 27 (recommending shortening service of process period from 120 to 60 days in order to "accelerate the scheduling of initial alternative dispute resolution and mandatory status conferences"). There is no demonstration in the report that the length of the service of process period has any effect on anything, and the author of this article has never even heard anecdotes about problems in civil case processing arising from the length of the service period.

85. *Id.* (recommending that judges' caseload statistics be published).

consumption. It is appropriate to ask, then, whose political agenda is being advanced?

B. Whose Crisis?

When Senator Biden introduced legislation⁸⁶ (which became known as the "Biden Bill") adopting the report's recommendations, federal judges promptly attacked the legislation, accusing Biden of attempting to "micromanage" the federal courts and circumvent the ordinary rulemaking process.⁸⁷ Eventually, the legislation was denounced by the Judicial Conference,⁸⁸ and both the American Bar Association's Board of Governors and the Federal Bar Association.⁸⁹ Even after extensive negotiations between Senator Biden's staff and the Judicial Conference (which attempted to preempt the legislation by voluntarily adopting some of its proposals),⁹⁰ the Conference ultimately announced a position disfavoring the bill.⁹¹

Nonetheless, the Civil Justice Reform Act as enacted contains most of the recommendations of the report.⁹² With the help of an advisory group, every district is required to implement a "civil justice expense and delay reduction plan."⁹³ Judges managed to forestall the mandatory adoption of most of the task force's delay and cost reduction ideas, but each district is required to go through the process of considering each of the recommendations, including tracking, deadlines for discovery, trial,

86. S. 2027, 101st Cong., 2d Sess. (1990).

87. Ann Pelham, *Biden, Judges Negotiate Civil Reform*, LEGAL TIMES, May 14, 1990, at 7; Ann Pelham, *Shall v. May; Judges Rebel Over One Word in Civil Reform Bill*, LEGAL TIMES, Oct. 15, 1990, at 6.

88. The Judicial Conference is the management and policy arm of the federal judicial branch. It is composed of the Chief Justice of the Supreme Court, the chief judge of each judicial circuit, and a district judge from each judicial circuit. See 28 U.S.C. § 331 (1982).

89. Pelham, *supra* note 87; *Bar Groups Oppose Biden Bill*, THIRD BRANCH, May 1990, at 5.

90. *Judges Address Civil Reform and Judgeship Needs*, THIRD BRANCH, July 1990, at 1-2; *Judicial Conference Approves Plan to Improve Civil Case Management*, THIRD BRANCH, May 1990, at 1-3 (The Judicial Conference plan provided for each trial court to "form an advisory group to study and recommend improvements in case management.")

91. *Hearings*, *supra* note 10, at 319, 333 (statement by the Honorable Robert Peckham). Senator Biden was particularly bitter about the failure of the judges' organization to support the legislation, as well as suggestions that he was trading judgeships (included in Title II of the legislation) for support for the more controversial Title I. See *id.* at 394-95 (Senator Biden). See also Mark Ballard, *Bill to Add U.S. Judges Shortchanges Texas* by 6, TEX. LAW., June 18, 1990, at 4 (quoting Judge Aubrey Robinson that the "patronage move [on judgeships] is designed to drum up support for an unpopular part" of the bill).

92. Civil Justice Expense and Delay Reduction Plans, Pub. L. 101-650, §§ 471-482, 104 Stat. 5090 (1990) (to be codified at 28 U.S.C. §§ 471-482).

93. *Id.* at § 471 (plans); *id.* at § 478 (advisory groups).

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and decisions on motions, and use of alternative dispute resolution.⁹⁴ The legislation also provides for a 10-district pilot program, in which the provisions for expense and delay reduction are mandatory rather than advisory.⁹⁵ Moreover, the recommendation that records concerning the state of individual judges' dockets be made public, which was strongly opposed by the judges, was adopted.⁹⁶ To date, \$25 million has been authorized to implement the act.⁹⁷

Senator Biden opened the hearings on the legislation by invoking the little guy, the "middle class [that] has been almost priced out of the civil litigation market."⁹⁸ But the story of the individual's experience in the civil justice system remains to be told. The crisis story being told in *Justice for All*, when all is said and done, is the story of the corporate client: everything costs too much and takes too long, and it is the lawyers' (and judges') fault. The testimony at the initial hearings in support of the legislation was, for the most part, from two witnesses who represented corporate clients.⁹⁹ As noted earlier, the task force itself was dominated by corporate counsel and financially underwritten in part by Aetna, whose advertising in support of its view that the civil litigation system is "berserk" is legendary.¹⁰⁰ Senator Biden is, of course, the senator from Delaware, home to hundreds of corporations.

What is the target of the corporate counsel? As is by now obvious, the answer is discovery. In testimony in support of legislation, corporate counsel consistently stated that the problem they thought the legislation combatted was "wide open discovery," a policy choice of the drafters of the Federal Rules with which they disagree.¹⁰¹ Thus, many of

94. *Id.* at § 473 (content of civil justice expense and delay reduction plans).

95. *Id.* at § 105.

96. *Id.* at § 476 (enhancement of judicial information dissemination). Under the Act, the Director of the Administrative Office of the United States Courts is ordered to prepare a report listing the number of motions that have been pending for six months and the name of the cases in which the motions are pending, the number and names of bench trials that have been submitted for more than six months, and the number and names of cases that have not been terminated within three years of filing. *Id.*

97. *Id.* at § 106.

98. *Hearings, supra* note 10, at 1.

99. *See id.* at 10-28 (statement of Patrick Head, Vice President and General Counsel of FMC Corporation) (Mr. Head also served on the task force as a representative of Business Roundtable, a group of large corporations, *id.* at 8); *id.* at 47-58 (testimony and prepared statement of Stephen Middlebrook, Senior Vice President and General Counsel, Aetna Life and Casualty).

100. *See supra* note 11.

101. *See, e.g., Hearings, supra* note 10, at 384 (testimony of Carl Liggio on behalf of American Corporate Counsel Association ("The root problem is that with the advent of the Federal Rules of Civil Procedure, we adopted a policy of wide open discovery."); *id.* at 14 (statement of Patrick Head, Vice President and General Counsel of FMC Corporation) ("I see little in the Federal Rules . . . that on balance helps defendants."))

the recommendations might be seen as a way to avoid policy choices that are viewed as benefitting the "have nots" at the (unjustified) expense of the "haves."¹⁰² This is, of course, an enormously controversial agenda, and one that was addressed explicitly in the 1983 amendments to the Federal Rules of Civil Procedure. As the Reporter to the Advisory Committee on the rules noted at the time, the 1983 amended rules became effective "by the thinnest hair you can think of,"¹⁰³ recounting the "very strong attempt by organized segments of the bar (particularly the defense bar) to change the pleading structure and the discovery structure, with an idea of achieving early issue formulation."¹⁰⁴ The defense bar, of course, views early issue formulation and discovery limits as substantive gains, likely to result in fewer settlements and fewer victories for plaintiffs.

The current Federal Rules reflect instead a more balanced approach, penalizing attorneys who engage in redundant or disproportionate discovery while largely leaving attorneys to assess the needs of their clients for themselves.¹⁰⁵ It is telling, in fact, that the task force report dismisses as "tinkering" the amendments to Federal Rule of Civil Procedure 16(b), which requires individualized setting of deadlines in all of the areas discussed by the report.¹⁰⁶

The task force repackaged the earlier attack on the Federal Rules as an attack on poor judicial case management, all in the service of access to "justice for all." However, the goals of the report — early issue foreclosure and discovery limits — mimic the earlier, defeated efforts to amend the Federal Rules more drastically to accomplish those things the report now advocates.

Thus, the Biden Bill fulfilled a variety of political needs, none of them very seriously tied to cost and delay reduction. First, it met the needs of a powerful senator, up for reelection, to perform a service for an equally-powerful constituency. Second, it did so in a way that could be sold as providing a public good (access to litigation services for the middle-class) by using buzz words (cost and delay reduction) that are

102. Discovery activity is most frequent in torts cases. KRITZER, *supra* note 47, at

101. To the extent torts cases involve repeat players like insurance companies as defendants against one-shot litigants as plaintiffs, the legislation represents just another validation of Galanter's famous thesis, with the arena simply moved from litigation to legislation. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (repeat players more likely to play for rules).

103. MILLER, *supra* note 28, at 1.

104. *Id.* at 24.

105. FED. R. CIV. P. 26(g) (sanctions for excessive discovery); *see also* MILLER, *supra* note 28, at 30-36 (stating that there is little evidence of widespread discovery abuse and noting wryly that discovery abuse is "quite simply . . . what your opponent is doing to you.").

106. REPORT, *supra* note 3, at 9.

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politically noncontroversial. As I have noted, its proposals are consistent less with the underlying reality of civil litigation in the federal courts than with the ideologies of its primary lobbyists, those representing corporate clients who are frequent defendants in the federal courts. Corporations are important constituents for Senator Biden, and they believe that the terms of the legislation work to their advantage. Senator Biden was able to point to the success of a piece of legislation attacking a set of "problems" — cost and delay — that are completely uncontroversial. Thus, he could communicate concern in a vague way with the problems of the average citizen, while deploring waste in government and by lawyers.¹⁰⁷ Given this set of factors, not even the opposition of the federal bench could result in derailing the bill.¹⁰⁸

II. A COMPARISON CRISIS: THE REPORT OF THE FEDERAL COURTS STUDY COMMITTEE

The Federal Courts Study Committee (FCSC) was created by Congress to "examine problems and issues currently facing the courts of the United States," and "develop a long range plan for the future of the

107. See Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980's*, 139 U. PENN. L. REV. 1, 79 (1990) (noting that voter behavior might be influenced by "affection for the politician who appears to be a 'regular person' and to understand and share one's values (or to have attractive values of her own).").

108. In fact, the opposition of the judiciary enraged Biden. See *Hearings*, *supra* note 10, at 393-96 (remarks of Sen. Biden). See also S. REP. NO. 416, 101st Cong., 2d Sess. 4-6 part II.D. ("Negotiations with and Involvement of The Judicial Conference of the United States"). This opposition was probably responsible for the changes the Senate Judiciary Committee made in the Judicial Conference's recommendations for increases in the numbers of judges. *Id.* at 33-34. Biden stated in the hearings on Title II, which authorized the creation of 77 new judgeships, "We have taken the recommendations [of the Judicial Conference] seriously, as the Judiciary Committee has always done. But in the end, . . . the Judicial Conference's recommendations are just that — recommendations — nothing more, nothing less." 136 CONG. REC. S6473 (daily ed. May 17, 1990). Senator Biden added, "I know of no other part of the Federal Government where regional agencies call national headquarters, ask for a multi-million dollar commitment of resources, and then are given by the Congress exactly what they want, no questions asked." *Hearings*, *supra* note 10, at 309. Most of this anger was the result of suggestions by some judges that Biden was trading judgeships for support, a theme to which Biden returned repeatedly during the June 26, 1990 Hearings. See *Hearings*, *supra* note 10. In again denying that this was so, Biden said, "As I think it is fair to say, the chairman of the committee, the Senator from Delaware, could have added two judges to Delaware and who would have made a case against it? But there are no new judges in Delaware." *Hearings*, *supra* note 10, at 393.

federal judiciary."¹⁰⁹ The Committee, as part of the Judicial Conference, was instructed to assess, among other things, alternative methods of dispute resolution, methods of resolving intracircuit and intercircuit conflicts, and the types of disputes resolved in the federal courts.¹¹⁰ In contrast to the task force membership, six of the fifteen committee members were judges and four were members of the House and Senate Judiciary Committees. The Committee chair, Judge Weis, stated his commitment to soliciting a broad spectrum of views.¹¹¹ Thus, the Committee appeared well-positioned to effect major reform, were it so inclined, in the federal courts. To date, however, only the Committee's least controversial proposals have been enacted.¹¹²

The FCSC report is 188 pages long, and supported by three volumes of additional materials. It is a fascinating compendium of suggestions, philosophical musings,¹¹³ and arguments. Like the task force report, it is premised on the existence of a crisis in the federal courts, or at least an "impending crisis."¹¹⁴ Unlike the task force recommendations, however, the FCSC recommendations for the most part need no "crisis" justification. Many of the recommendations, such as the suggestion that pendent jurisdiction doctrines be codified, or federal statutes of limitation adopted, are independently justified as sound judicial administration and are relatively uncontroversial.¹¹⁵ To what end, then, is the existence of a crisis invoked in the FCSC report? And whose crisis is it?

109. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988). See Joseph F. Weis, Jr., *The Federal Courts Study Committee Begins Its Work*, 21 ST. MARY'S L. J. 15 (1989). Judge Weis chaired the Committee, whose membership included, in addition to the judges, Senators Howell Heflin and Charles Grassley of the Senate Judiciary Committee and Representatives Robert Kastenmeier and Carol Moorehead of the House Judiciary Committee.

110. Weis, *supra* note 109.

111. *Id.* at 16.

112. 136 CONG. REC. H8262 (daily ed. Sept. 27, 1990) (remarks of Rep. Kastenmeier) ("noncontroversial recommendations"); 136 CONG. REC. S17578 (daily ed. Oct. 27, 1990) (remarks of Sen. Grassley) (legislation represents "only those consensus items that enjoyed unanimous support"). Justice Rehnquist reports that some of the Committee's proposals have been implemented "through administrative action of the Judicial Conference." William H. Rehnquist, *1990 Year-End Report of the Federal Judiciary*, THIRD BRANCH, Jan. 1991, at 1-2. Senator Heflin has introduced new legislation to implement some of the FCSC proposals. See *Senator Howell Heflin: A Champion of Court Reform on Capitol Hill*, THIRD BRANCH, Oct. 1990, at 10.

113. After several pages making the case for viewing the federal courts as in "crisis," the FCSC report asks (rhetorically), "What is to be done?". It then expresses a preference for incremental rather than radical reform, supporting its preference with Edmund Burke and Thomas Jefferson, two renowned court watchers. FCSC, *supra* note 5, at 9.

114. FCSC, *supra* note 5, at 4.

115. See George D. Brown, *Nonideological Judicial Reform and Its Limits — The Report of the Federal Courts Study Committee*, 47 WASH. AND LEE L. REV. 973, 994 (1990) (regretting that the FCSC report avoided "ideological issues concerning the federal courts," especially those concerning federal jurisdiction).

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A. *The Crisis Part II: The Deteriorating Bench*

The crisis described by the FCSC is a subtly different one from the crisis described in *Justice for All*. The FCSC report describes a trebling of the caseload in the federal trial courts between 1958 and 1988, a phenomenon whose cause, the report states, is "not fully understood but certainly include[s] the continued growth of federal law and in particular the creation of many new federal rights both by Congress and by judicial interpretation of the Constitution, and a variety of procedural developments such as expanded use of class actions and 'one-way' shifting of attorneys' fees."¹¹⁶ As a result of the caseload increase, which has been recently exacerbated by increased filings caused by the war on drugs, judges are beginning to fall behind. Unlike the task force, the FCSC provides some documentation for this claim: "whereas in 1960 it would have taken the district courts only nine months to dispose of all their pending cases . . . at their then rate of terminations, by 1989 this figure had risen to 11.7 months."¹¹⁷ A slip of 2.7 months in nearly 30 years might not strike many people as a disaster (especially since, as noted above, the median time for dispositions is still not great). Nor is an increase in the number of cases in the federal courts, in and of itself, necessarily a cause for alarm. If, as the FCSC speculates, the increase is due to congressional expansion of causes of action, then it represents a series of political choices that can be debated on their own merits. The selective catalogue above — congressional creation of causes of action, judicial activism, fee-shifting statutes (of which the most obvious is 42 U.S.C. section 1988, providing for attorneys' fees to successful civil rights plaintiffs) and class actions (which have been declining over time) — betrays an ideological bias. Other obvious but unmentioned causes of caseload stresses are executive branch decisions, such as the Social Security Administration's decisions in the 1980's to drop thousands of people from the disability rolls.¹¹⁸

However, if the "long-expected crisis in the federal courts . . . is at last upon us," and if the crisis consists of an increase in case filings, one might expect an argument for increasing the number of judges, either because the increase is affecting the amount of time it takes to get a

116. FCSC, *supra* note 5, at 5. Compare RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985) for a similar description of the crisis. Judge Posner was a member of the FCSC.

117. FCSC, *supra* note 5, at 6.

118. See, e.g., Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 B.Y.U. L. REV. 461, 484-506 (1990). See generally Marc Galanter, *Case Congregations and Their Careers*, 24 LAW & SOC'Y REV. 371 (1990).

decision, or because it is affecting the quality of the decisions, or the judges' job satisfaction.¹¹⁹

Here the FCSC makes a controversial argument, suggesting an increase in federal judges as a short-term solution, but disfavoring increasing the number of judges in the future as a long-term solution in favor of reducing the number of cases allowed in federal court. What supports a limitation on the adjudicative capacity of the federal courts? The FCSC makes the following argument:

The independence secured to federal judges through Article III is compatible with responsible and efficient performance of judicial duties only if federal judges are carefully selected from a pool of competent and eager applicants and only if they are sufficiently few in number to feel a personal stake in the consequences of their actions. Neither condition can be satisfied if there are thousands of federal judges.¹²⁰

The report argues that without a significant increase in salaries, it would be impossible to attract a large number of such qualified applicants in any event. Nor would it be wise to increase the federal judiciary much, because such an increase could only lead to difficulties in coordinating the federal judicial system, and an increase in intercourt conflicts. And, the report warns, respect for federal judges will erode unless "the federal judiciary is perceived as a small and special corps of men and women whose talents are reserved for issues that transcend local concern, rather than as a faceless, omnipresent bureaucracy."¹²¹

In addition to these reasons for not adding federal judges, the report suggests another: the courts are approaching "the limits of [their] natural growth."¹²² While the federal bench is really quite tiny given our

119. On the effect of caseload on the judges' reported job satisfaction, see Robel, *supra* note 14, at 38-40.

120. FCSC, *supra* note 5, at 7.

121. *Id.*

122. FCSC, *supra* note 5, at 8. In testimony before the Federal Courts Study Committee, Judith Resnik notes,

[T]he peculiarity of the views [that the federal courts have "natural" limits that have been reached] may best be illustrated by considering comparable arguments made about the other branches of the federal government. For example, imagine someone objecting to the transformation of one of the federal territories, such as Puerto Rico, into a state on the grounds that no more states can be admitted to the union because Congress has reached its 'natural size.' . . . [T]he appropriate response would be that one does not begin an analysis by stipulating the absolute size of a branch of the federal government, but rather that one begins by considering the responsibilities that the branch must serve, and *then* one thinks about the optimal size.

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population, or in comparison to the number of judges in some of the more populous states,¹²³ the report suggests that the ceiling might be reached at 1000.¹²⁴

Finally, the report argues, an expansion in the number of judges "is likely to come at the expense of the states, and thus to impair the fundamental constitutional concept of *limited* federal government. Keeping the federal judiciary relatively small increases the likelihood that federal intervention will be limited to those situations in which it is most clearly necessary."¹²⁵

The FCSC suggests, then, that not enough qualified and interested applicants for positions on the federal bench exist to support an increase in the number of federal judges to meet the caseload, and that if they did exist, it would still be a bad idea to increase the federal bench for both political and ideological reasons. As to the first of these arguments, the FCSC does not present any evidence that judges are becoming more difficult to recruit, that the pool of potential judges is in fact a tiny one, or that an increase in judges would lead current judges to abandon the bench in despair.¹²⁶ As to the second, agreement with the report's conclusions requires adherence to a vision of the federal courts that is enormously controversial, one that views the federal courts as disfavored institutions of last resort ("federal intervention will be limited to those situations in which it is *most clearly necessary*"),¹²⁷ at odds with tenets of federalism (expansion "is likely to come at the expense of the states").¹²⁸

Hearings of the Federal Courts Study Committee, Jan. 29, 1990, San Diego, Cal. (testimony of Judith Resnik) (on file with author).

123. The total number for federal judges at the time of the report was around 750. FCSC, *supra* note 5, at 8. Judith Resnik, in noting the oddity of this section of the FCSC, compares the number of state court judges: 769 state court judges sit on intermediate appellate courts, 6204 sit in courts that have appellate and original jurisdiction, and another 12,929 are trial judges. Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 936 (1990). See also DANIEL J. MEADOR, *AMERICAN COURTS* 35 (1991) (noting that the number of trial judges in California is greater than the total number of federal trial judges).

124. FCSC, *supra* note 5, at 8.

125. *Id.*

126. Robel, *supra* note 14, at 38-40. When asked whether they would take the job again if it were offered to them, 14 appellate judges said they would not, compared to 48 judges who would "jump at the opportunity" and 89 who would "give the matter careful thought." *Id.* at 40. Moreover, judges themselves were split on the question of whether an increase in caseload should be addressed through adding judges: 52% of the respondents would add judges to meet additional caseload. *Id.* at 41 n.153.

127. FCSC, *supra* note 5, at 8 (emphasis added).

128. *Id.* This vision of the federal courts parallels the one expressed by one of the FCSC subcommittee chairs, Judge Richard Posner, in his book *THE FEDERAL COURTS: CRISIS AND REFORM* (1985). For an insightful review of this book's crisis claims, see Jack M. Beermann, *Crisis? What Crisis?*, 80 NW. U. L. REV. 1383 (1987).

B. *Whose Crisis is This?*

By eliminating the option of increasing adjudicative capacity to keep up with demand at the outset, the FCSC is able to support a variety of recommendations that would drastically curtail access to federal courts, from new exhaustion of remedies requirements for prisoner civil rights plaintiffs¹²⁹ to severely restricted access in social security cases,¹³⁰ to amount in controversy restrictions on Federal Tort Claim Act cases.¹³¹ As it turns out, these are the kinds of low-status, low-resources types of cases that judges often view as tedious and professionally uninteresting.¹³² Thus, the FCSC transformed a "crisis" — increased caseload — into a brief for a vision of the federal courts that protects, first, the prestige of the judges' positions by artificially keeping the numbers of those judges down, and second, the judges' ability to preserve their status by work on the high-stakes, high-prestige cases on which reputations are built.¹³³ The crisis developed in the FCSC report, then, is a judges' crisis, and the solutions the report offers are consistent less with a concept of just resource allocation within the federal courts than with a view of what would enhance the professional satisfaction and prestige of judges.

I do not mean by this discussion to suggest that the FCSC report does not contain worthwhile and interesting recommendations.¹³⁴ Rather, I intend only to question the report's creation and assessment of yet another court crisis. As with *Justice for All*, *The Report of the Federal Courts*

129. FCSC, *supra* note 5, at 48-49. This proposal drew dissents from Congressman Kastenmeier and Mr. Aprile, both of whom noted that the Civil Rights for Institutionalized Persons Act, 42 U.S.C. § 1997e, already provides for exhaustion of grievance procedures, which the states refuse to implement. Both argue, fairly persuasively, that the procedural protections in the act ought not be abandoned simply because the states do not want to comply with them. *Id.*

130. FCSC, *supra* note 5, at 55-58. Federal court review in disability cases would be limited to constitutional questions and "pure questions of law."

131. *Id.* at 81. The FCSC also proposes a small-stakes binding arbitration requirement in employment cases. *Id.* at 59-60.

132. Lauren K. Robel, *The Myth of the Disposable Opinion*, 87 MICH. L. REV. 940, 953 (1989) (noting that civil rights actions, employment discrimination complaints, and social security cases disproportionately decided through unpublished opinions).

133. On the structure of prestige within the legal profession, see JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE CHICAGO BAR 91, Table 4.1 (1982) (prestige rankings of thirty fields of law). In the Heinz and Laumann rankings, prisoner civil rights and social security disability cases (which would presumably fit within the category of poverty law) rank in the bottom third for prestige. One important study of federal appellate judges noted that the judges' primary reference groups are professionals (other judges especially). J. WOODFORD HOWARD, JR., THE COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 151 (1981). Thus, the judges are likely to resist developments that threaten their professional standing.

134. By allowing dissents, the FCSC report, unlike the Brookings report, makes it much easier to assess the value of the various recommendations it advances. FCSC, *supra* note 5.

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Study Committee uses crisis rhetoric to advance the interests of a group of court insiders by masking the controversial and making it appear inevitable, simply a necessary result of a disturbing "crisis" that threatens to overwhelm the courts.

III. CONCLUSION

We need the federal courts. We file around 300,000 lawsuits in them every year.¹³⁵ We depend on them for the vindication of a variety of federal interests. Access to them has a symbolic resonance, and arguments that it should be more difficult for certain classes of plaintiffs to prove their lawsuits, or that some plaintiffs should be booted out altogether, are always controversial.

Both *Justice for All* and *The Report of the Federal Courts Study Committee* recognize the controversy that attends such arguments. They attempt to circumvent the controversy by couching proposals that do just that in crisis rhetoric, implicitly arguing that the things we cherish about the federal courts are threatened without agreement with their views. Upon close scrutiny, however, the crisis is chimerical, the solutions unnecessary, or their necessity unproven.

Evoking crisis is a standard political ploy, one familiar to every politician.¹³⁶ However, the existence of a crisis of some sort in the federal courts has reached a level of acceptance that makes dissent seem almost eccentric.¹³⁷ My hope in this article is to demonstrate that such claims always deserve close scrutiny, for it is our very dependence upon and respect for the federal courts that makes crisis rhetoric tempting.

135. MEADOR, *supra* note 123, at 34.

136. See, e.g., MICHAEL EDELMAN, *THE SYMBOLIC USES OF POLITICS* 69-71 (1967) (recounting the FBI's creation and stoking of the crisis of communist infiltration).

137. See, e.g., Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 *FORDHAM L. REV.* 1 (1990) (stating that because of court crisis, "litigants . . . are being denied meaningful access to the courts").

